July 26, 2018

VIA REGULATIONS.GOV

Re: Comments Regarding EPA's Proposed Approval and Promulgation of Implementation Plans; Texas; Reasonably Available Control Technology in the Houston-Galveston Brazoria Ozone Nonattainment Area, 83 Fed. Reg. 29,727 (June 26, 2018), EPA Docket No. EPA–R06–OAR–2017–0055; FRL–9979– 57—Region 6

Sierra Club, Earthjustice, Texas Environmental Just Advocacy Services (TEJAS), Air Alliance Houston, and Public Citizen ("Commenters") submit these comments on the U.S. Environmental Protection Agency's ("EPA's") Proposed Approval and Promulgation of Implementation Plans; Texas; Reasonably Available Control Technology in the Houston-Galveston Brazoria Ozone Nonattainment Area, 83 Fed. Reg. 29,727 (June 26, 2018), EPA Docket No. EPA–R06–OAR–2017–0055; FRL–9979– 57—Region 6.

Ozone pollution in the Houston area is dangerous to children, seniors, people with lung ailments, and many others. On some days, the air is so dirty that kids are warned to stay in side, people are hospitalized, and some are at risk of dying. Like Texas's attainment demonstration plan for the 2008 ozone standard, the state's Reasonably Available Control Technology ("RACT") plan for the Houston-Galveston-Brazoria ("HGB") nonattainment area fails to meet the requirements of the Clean Air Act, and thus fails to adequately protect people from the dangers of ozone. As we explained in our comments on the Texas attainment demonstration for the HGB area, the Texas Commission on Environmental Quality's ("TCEQ") own modeling and certified monitoring data make clear that the HGB area is not meeting (and will not meet) the

ED_002374_00011557-00001

2008 ozone health standard (NAAQS) of 75 parts per billion ("ppb") by the statutory deadline.[1] For that reason, the state's RACT state implementation plan ("SIP") is inadequate, and the state (and EPA) must evaluate and adopt additional and stronger RACT controls , and evaluate and adopt controls beyond RACT as needed to assure timely attainment.

EPA's proposed approval of the TCEQ "attainment demonstration" is arbitrary, capricious, and contrary to law for several reasons. In particular and as further detailed below:

- EPA must disapprove the RACT SIP because actual monitoring data demonstrates that the HGB area has already failed to timely meet the Clean Air Act's attainment deadline.[2] As a result, the state's RACT SIP provisions have, by definition, failed to meet the statutory mandate to "provide for attainment." 42 U.S.C. § 7502(c)(1). Because the HGB area has failed to meet the 2008 ozone standard by the statutory deadline, EPA must disapprove the state's RACT SIP and the state must evaluate and adopt additional and stronger RACT controls, as well as beyond RACT controls, as necessary to assure timely .

- EPA's regulations direct the state to review and consider any RACT measures submitted by the public, including measures identified in public comments seeking new measures and/or strengthening of existing measures. 80 Fed. Reg. 12,264, 12,278-12,280 (2015). Although Air Alliance Houston, urged the state to impose additional available monitoring and control techniques for certain sources, the state failed to address any of these proposals in its response to comments. EPA's attempt to rationalize the state's refusal to consider available control techniques for oil and gas sources is unlawful.

---

[1] *See* EPA Docket No. EPA–R06–OAR–2017–0053, Sierra Club, Air Alliance Houston, TEJAS, Public Citizen, and Earthjustice Comments Regarding EPA's Proposed Approval and Promulgation of Implementation Plans; Texas; Attainment Demonstration for the Houston-Galveston-Brazoria Ozone Nonattainment Area (filed June 28, 2018); see also EPA, Technical Support Document for 2008 8-Hour Ozone NAAQS (75 ppb) Houston/Galveston/Brazoria Modeling and Other Analyses Attainment Demonstration at 154, Table 4-3 (May 2018), EPA-R06-OAR-2017-0053-0003 [hereinafter "MOAAD TSD"].

[2] *See* 83 Fed. Reg. at 24,452-53, Table 2 (monitoring data demonstrating that, taking the average of the 4th High values from three consecutive years, at least one regulatory monitor is not in attainment).

Texas's regulatory and non-regulatory monitors indicate that the 2018 design values for certain monitors in the HGB area are likely to exceed the NAAQS. At least two non-regulatory monitors (Crosby Library and Wallisville Road) in the area have already exceeded the limit in 2018. And just three months into the ozone season, the fourth highest 2018 reading at the regulatory monitor Baytown Garth (formerly Baytown Eastpoint) is at 81 ppb. *See* https://www.tceq.texas.gov/cgi-bin/compliance/monops/8hr_4highest.pl; https://www.tceq.texas.gov/assets/public/compliance/monops/air/5yr/2015-5yr-coastal.pdf (noting the change in the name of the Baytown regulatory monitor).

ED_002374_00011557-00002

- Texas rules unlawfully continue to allow sources to avoid enforcement based on claim that a violation occurred during startup, shutdown, or a malfunction ("SSM"), even though the affirmative defense violates the Clean Air Act.

- Texas unlawfully failed to revisit source categories for which the state previously found (in the SIP submittal for the 1997 ozone NAAQS) that no additional controls were needed.

- Finally, the threshold for the application of RACT should be 25 tons per year ("tpy"), not 100 tpy, because the HGB area is properly classified as a "severe" nonattainment area under both the 2008 and 1997 NAAQS. As explained below, EPA's attempt to strip those classifications via "substitute redesignation" was illegal (and is currently under review).

I. INTRODUCTION

Residents of the HGB area are consistently exposed to some of the highest ozone levels in the Central United States. Indeed, air quality monitors in the area consistently exceed the ozone levels current scientific research dictates as necessary to protect human health—especially for sensitive populations such as children, asthmatics, and the elderly. In fact, the HGB area consistently ranks as one of the most polluted cities in the country for ozone.[3] And in just the first few months of the 2018 ozone season, Texas's own monitoring data indicates that the area is on track to continue violating the 2008 standard, with numerous exceedances of healthy air quality levels at several monitors throughout the HGB area.[4] And those exceedances are likely to continue into the core period of the ozone season.

For decades, the eight counties surrounding Houston area have struggled to attain federal National Ambient Air Quality Standards ("NAAQS") for ozone pollution, which are designed to protect human health and welfare. For more than forty years—throughout the implementation of the most recent 2008 ozone standard to the first 8-hour standard in 1997, and further back to the 1-hour standard, and then further back still to photochemical oxidant standards in the early 1970's—the HGB area has consistently failed to meet ozone maximum ozone air quality standards designed to protect human health and welfare. Indeed, the same eight counties in the HGB area—Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller—have been designated "nonattainment" under each of EPA's ozone NAAQS, meaning they have had, or have been contributing to, ozone pollution levels that violate health standards

[3] http://www.lung.org/our-initiatives/healthy-air/sota/city-rankings/most-polluted-cities.html.

[4] TCEQ's data demonstrates that the fourth-highest ozone reading at least one regulatory monitor (Baytown Garth, formerly Baytown Eastpoint in Table 2 of the Proposed Approval) and two non-regulatory monitors (Crosby Library and Wallisville) in the HGB area have already exceeded the standard, with several other monitors reflecting ozone levels as high as 88 ppb. *See* https://www.tceq.texas.gov/cgi-bin/compliance/monops/8hr_4highest.pl.

ED_002374_00011557-00003

for ozone since the 1970s. 40 C.F.R. § 81.344.[5] And air quality monitors throughout the HGB area regularly reflect exceedances of federal standards.

Texas's failing air quality has serious and well-documented health consequences for the nearly 7 million Texans that live in the HGB area, which has air that has been classified by EPA as unsafe to breathe.[6] Scientific research continues to strengthen our understanding of the harm that ozone causes to public health. Exposure to ozone is connected to a wide range of significant human health impacts including respiratory and cardiovascular harms, premature deaths, perinatal and reproductive impacts, and central nervous system and developmental harms. Serious health impacts have been demonstrated through controlled human exposure, epidemiologic, and toxicological studies.[7] The physiological impacts of ozone exposure are experienced even by healthy individuals and even at relatively low concentrations of ozone. Moreover, there is a growing body of scientific evidence showing that repeated exposure over time causes additional health impacts, which may be more severe and less likely to be reversible.

Ozone exposure has also been linked to the exacerbation of asthma, as well as development of the disease. For individuals already diagnosed with asthma, evidence shows that ozone exposure increases the likelihood of having an asthma attack.[8] Ozone exposure has been shown to have especially significant effects on asthma exacerbation among children. Children living in areas with higher ambient ozone concentrations have been shown to be more likely to either have asthma or to experience asthma attacks compared with children living in areas having lower ambient ozone concentrations.[9]

Additionally, certain "sensitive" groups and individuals are found to have significantly greater susceptibility to ozone-related health impacts. In a 14-year study of 95 U.S. cities, links were found between short-term increases in ozone and premature mortality, even when excluding days exceeding 60 ppb, finding that that "daily changes in ambient O_3 exposure are

---

[5] Under the Clean Air Act, EPA has established three national ambient air quality standards for ozone that are relevant here: in 1979, 1997, and 2008. 73 Fed. Reg. 16,436 (Mar. 27, 2008); 62 Fed. Reg. 38,856 (July 18, 1997); 44 Fed. Reg. 8,202 (Feb. 8, 1979).

[6] http://quickfacts.census.gov/qfd/maps/texas_map.html.

[7] *See* U.S. Environmental Protection Agency (2013). Integrated Science Assessment for Ozone and Related Photochemical Oxidants (Final Report) EPA/600/R-10/076F, 2013, *available at* http://cfpub.epa.gov/ncea/isa/recordisplay.cfm?deid=247492 [hereinafter, "ISA (2013)"].

[8] *See, e.g.*, Franze et al., Protein nitration by polluted air, Enviro Sci Technol. 39: 1673-1678 (2005), http://dx.doi.org/10.1021/es0488737; .U.S. Environmental Protection Agency, Air quality criteria for ozone and related photochemical oxidants [EPA Report], (EPA/600/R-05/004AF) (2006), http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=149923.

[9] Akinbami, The association between childhood asthma prevalence and monitored air pollutants in metropolitan areas, United States 2001-2004 (Environ Res. Apr. 2010), 110(3):294-301, http://dx.doi.org/10.1016/j.envres.2010.01.001.

ED_002374_00011557-00004

linked to premature deaths, even at very low pollution levels."[10] Other health impacts linked to ozone exposure are related to newborns and the developing fetus.[11] Prenatal exposure to ozone has been linked to reduced birth weight, premature delivery, and birth defects.[12]

II. LEGAL STANDARDS

Under the Clean Air Act, implementation plans for nonattainment areas "shall provide for the implementation of all reasonably available control measures as expeditiously as practicable (including such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology) and shall provide for attainment of the national primary ambient air quality standards." 42 US.C. § 7502(c)(1). Reasonably available control technology "defines the lowest emission limit that a particular source is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility." Memorandum from R. Strelow, Asst. Adm'r, EPA, Office of Air and Waste Management, to Reg'l Adm'rs, EPA Regions I-X, re: *Guidance for Determining Acceptability of SIP Regulations in Non-Attainment Areas* 2 (Dec. 9, 1976); *see* 80 Fed. Reg. 2,846, 2,847/3 (Jan. 21, 2015). Moderate and higher ozone nonattainment areas must develop plans that implement "reasonably available control technology under [42 U.S.C. §] 7502(c)(1)" for specific categories of sources covered by Control Technique Guidelines ("CTGs"), as well as for "all . . . major stationary sources of [volatile organic compounds]" and NOx. 42 U.S.C. § 7511a(b)(2), (f).

"RACT encompasses stringent, or even 'technology forcing,' requirement[s]." Mem. from R. Strelow 2; *see also Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 492 (2001) (Breyer, J., concurring) (noting that technology forcing requirements "are still paramount in today's [Clean Air] Act"). RACT protects people's health by representing "the toughest controls considering technological and economic feasibility," and "[a]nything less than this is by definition less than RACT and not acceptable" in nonattainment areas. Mem. from R. Strelow 3. EPA must protect the public health by ensuring nonattainment areas implement RACT "even if it requires significant sacrifices." *Id.* at 5. Thus, to drive timely attainment, RACT may call for use of very stringent controls, and RACT determinations themselves must be made in a timely manner. *See Miss. Comm'n on Envtl. Quality v. EPA*, 790 F.3d 138, 146 (D.C. Cir. 2015).

To ensure the implementation of effective and feasible technology, states must submit supporting evidence for their RACT submissions. *NRDC v. EPA*, 571 F.3d 1245, 1254 (D.C. Cir. 2009); see, e.g., 80 Fed. Reg. 12,264, 12,278/2-80/2 (Mar. 6, 2015). Consistent with advancing technology, states are prohibited from just relying on previous RACT determinations. See 81 Fed. Reg. 58,010, 58,037/3 (Aug. 24, 2016). "Past experience has shown that due to ongoing

---

[10] Bell et al., The Exposure-Response Curve for Ozone and Risk of Mortality and Adequacy of Current Ozone Regulations, Environ Health Perspect. 114:532-536 (2006), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1440776/.

[11] ISA (2013) at 2-20.

[12] Salam et al., Birth Outcomes and Prenatal Exposure to Ozone, Carbon Monoxide, and Particulate Matter: Results from the Children's Health Study, *Environ Health Perspec.*113: 1638-1644 (2005), http://dx.doi.org/10.1289/ehp.8111.

ED_002374_00011557-00005

innovation, cost-effective control technologies and process alternatives for many sectors continue to be developed...." *Id.* To stay up to date, EPA requires states to rely on information available at the time RACT SIPs are in development. In particular, states must use EPA guidance like ACTs, information from public comments, and other relevant information available at the time of RACT SIP development. See, e.g., 80 Fed. Reg. at 12,279/2. As some ACTs and CTGs are outdated, EPA says states need to look to current information in other forms to provide adequate analysis, and there is no need to wait for revised ACTs or new CTGs. *Id.*; 78 Fed. Reg. 34,178, 34,192/2-3 (June 6, 2013).

EPA also evaluates RACT SIPs against information available at the time of submission and can rely on its own information to support or question states" analysis. EPA reviews RACT SIPs on a case-by-case basis to determine if the RACT SIPs are consistent with the CAA RACT requirements, and any relevant CTGs or ACTs. *See, e.g.*, 69 Fed. Reg. 62,583, 62,584/1-2 (Oct. 27, 2004). The state and EPA must consider and address available information and ideas for stronger control measures, including information and ideas provided in public comments. *See id.* EPA's use of available information mirrors the requirement for states to use available information at the time of RACT SIP development.

III. EPA MUST DISAPPROVE TCEQ'S RACT SIP BECAUSE ACTUAL MONITORING DATA DEMONSTRATES THAT THE HGB AREA DID NOT MEET THE ATTAINMENT DEADLINE.

The Clean Air Act "requires all nonattainment areas to achieve compliance with the ozone NAAQS 'as expeditiously as practicable,' but in all events 'not later than' the 'Primary standard attainment date' set forth in" 42 U.S.C. § 7511(a)(1). *Natural Resources Defense Council v. E.P.A.* ("*NRDC v. EPA*"), 777 F.3d 456, 464 (D.C. Cir. 2014) (quoting Section 7511(a)(1)); *see also Sierra Club v. E.P.A.*, 294 F.3d 155, 158–59 (D.C. Cir. 2002). EPA lacks authority to modify those statutory deadlines; therefore, the attainment deadline for subsequent iterations of the ozone NAAQS are governed by the applicable "attainment period" contained in 42 U.S.C. § 7511(a)(1). *NRDC* v. *EPA*, 777 F.3d at 464-69. Thus, for all 2008 "moderate" ozone nonattainment areas, including the HGB area, the statute and EPA rules required the states to demonstrate attainment of the 2008 standard "as expeditiously as practicable," but in no event later than July 20, 2017. 42 U.S.C. § 7511(a)(1); 83 Fed. Reg. 24,447; *see also* 80 Fed. Reg. 12,264 (Mar. 6, 2015). EPA granted the Houston area a 1-year extension of that deadline to July 20, 2018, pursuant to 42 U.S.C. §7511(a)(5); to meet that extended deadline, the state had to show that the area would actually be in attainment by 2017. Additionally, under the Clean Air Act, a state's RACT implementation plan "shall provide for the implementation of all reasonably available control measures as expeditiously as practicable (including such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology) and shall provide for attainment of the national primary ambient air quality standards." 42 U.S.C. §§ 7502(c)(1); 7511a(b)(2).

As we explained in our comments on the Texas attainment demonstration SIP for the HGB area, the state's own modeling and certified monitoring data make clear that the HGB area is not meeting (and will not meet) the 2008 ozone NAAQS by the statutory deadline.[13] EPA

[13] *See* EPA Docket No. EPA–R06–OAR–2017–0053, Sierra Club, Air Alliance Houston, TEJAS, Public Citizen, and Earthjustice Comments Regarding EPA's Proposed Approval and

ED_002374_00011557-00006

must disapprove the RACT SIP because actual monitoring data demonstrates that the HGB area has already failed to timely meet the Clean Air Act's attainment deadline.[14] As a result, the state's RACT SIP has, by definition, failed to meet the statutory mandate that it "shall provide for attainment." 42 U.S.C. § 7502(c)(1). Because the HGB area has failed to meet the 2008 ozone standard by the statutory deadline, EPA must disapprove the state's RACT SIP and the state must identify additional and/or stronger controls that are reasonably available and adequate to assure attainment as expeditiously as practicable. 80 Fed. Reg. at 12,279/3 (noting that it may be necessary for states to achieve beyond RACT reductions to show attainment as expeditiously as practicable). The state must then adopt such measures as SIP revisions.

Here, the state simply recycled its earlier RACT determinations for the 1997 and 1-hour ozone NAAQS without reevaluating the stringency of any of its previous RACT determinations except one set of rules dealing with tank emissions. And according to the state's own statements, the level of emission controls required by the new tank rules was already being achieved by the relevant sources. 41 Tex. Reg. 7934, 7938 (Oct. 7, 2016). Thus, the state's RACT plan for HGB effectively provides for no additional controls beyond what is already required or being achieved. The state's failure to even investigate or consider adopting more stringent RACT rules for HGB therefore violates the Clean Air Act, and accordingly EPA cannot lawfully or rationally approve the RACT plan. 42 U.S.C. §§ 7502(c)(1), 7410(l), 7511a(b)(2). This is plainly not a situation in which the state has exhausted efforts to identify and adopt every RACT measure. By way of example, in September 2006, EPA approved a SIP revision for the HGB area that actually reduced the control effectiveness for NOx from 90% to 80% purportedly in exchange for increasing the stringency of VOC controls on sources of highly reactive VOCs. See 71 Fed. Reg. 52659 (Sept. 6, 2006) (codified at 30 Tex. Admin. Code § 101.390 *et seq.*). Thus, there is plainly room for strengthening NOx controls.

Promulgation of Implementation Plans; Texas; Attainment Demonstration for the Houston-Galveston-Brazoria Ozone Nonattainment Area (filed June 28, 2018); *see also* EPA, Technical Support Document for 2008 8-Hour Ozone NAAQS (75 ppb) Houston/Galveston/Brazoria Modeling and Other Analyses Attainment Demonstration at 154, Table 4-3 (May 2018), EPA-R06-OAR-2017-0053-0003 [hereinafter "MOAAD TSD"].

[14] See 83 Fed. Reg. at 24,452-53, Table 2 (monitoring data demonstrating that, taking the average of the 4th High values from three consecutive years, at least one regulatory monitor is not in attainment).

Texas's regulatory and non-regulatory monitors indicate that the 2018 design values for certain monitors in the HGB area are likely to exceed the NAAQS. At least two non-regulatory monitors (Crosby Library and Wallisville Road) in the area have already exceeded the limit in 2018. And just three months into the ozone season, the fourth highest 2018 reading at the regulatory monitor Baytown Garth (formerly Baytown Eastpoint) is at 81 ppb. *See* https://www.tceq.texas.gov/cgi-bin/compliance/monops/8hr_4highest.pl; https://www.tceq.texas.gov/assets/public/compliance/monops/air/5yr/2015-5yr-coastal.pdf (noting the change in the name of the Baytown regulatory monitor).

ED_002374_00011557-00007

IV. TEXAS FAILED TO REVIEW AND CONSIDER RACT MEASURES SUBMITTED BY THE PUBLIC, INCLUDING PUBLIC COMMENTS SEEKING STRENGTHENING OF EXISTING MEASURES.

As noted, EPA's regulations direct the state to review and consider RACT measures submitted by the public, including public comments seeking strengthening of existing measures. 80 Fed. Reg. 12264, 12278-12280 (Mar. 6, 2015). The state failed to do so here. For example, at the state's public hearing on the plan, a representative of Air Alliance Houston urged that the state require that compliance with SIP requirements be determined via continuous, direct monitoring technology, and that continuous emissions monitors be in place at flares and emission points generally. https://www.regulations.gov/document?D=EPA-R06-OAR-2017-0055-0003, Public Hearing Tr. at 6. The same speaker called on the state to consider adoption – as RACT for the HGB area- of the federal CTGs for oil and gas operations. The state did not address any of these proposals in its response to comments– it responded only to comments from industry.

EPA's attempt to rationalize the state's refusal to consider available control techniques for oil and gas sources is unlawful and arbitrary for two reasons. First, it is the state—not EPA—that must initially consider measures identified in comments and either adopt them or provide a reasoned basis for not doing so. Second, EPA's rationale is groundless. The agency asserts that Texas was not required to adopt CTGs until a date after the SIP submittal. That hardly provides a reasoned explanation for the state's failure to even consider adopting the measure as RACT sooner, particularly where additional emission reductions are needed to attain the ozone standard in the area. Equally baseless is EPA's assertion that it is reconsidering the CTGs, as the agency has not yet taken final action to change or withdraw it.

V. TEXAS RULES UNLAWFULLY CONTINUE TO ALLOW SOURCES TO AVOID ENFORCEMENT BASED ON CLAIMS THAT A VIOLATION OCCURRED DURING STARTUP, SHUTDOWN, OR A MALFUNCTION ("SSM"), EVEN THOUGH THE AFFIRMATIVE DEFENSE VIOLATES THE CLEAN AIR ACT.

Texas's RACT SIP for the HGB area is unlawful because the state regulations continue to allow sources to avoid enforcement based on claims that a violation occurred during startup, shutdown, or a malfunction ("SSM"), even though such an affirmative defenses violate the Clean Air Act. EPA cannot approve the state's RACT SIP under these circumstances.

In 2015, EPA promulgated a final rule requiring states to eliminate unlawful exemptions and affirmative defenses unlawful that allow large emitters of pollutants like NOx and VOCs to violate Clean Air Act emission limitations during startup, shutdown, and malfunction events without consequences. SSM SIP Call, 80 Fed. Reg. 33,840 (Jun. 12, 2015). In so doing, EPA recognized that SSM emissions from industrial facilities, such as refineries and coal plants, often far exceed emissions from normal operations, and pose significant public health concerns. Moreover, states are required to adopt SIPs to bring air quality into compliance with, or to maintain compliance with, the health-based National Ambient Air Quality Standards ("NAAQS"). In requiring states to repeal exemptions and affirmative defenses for SSM operations, EPA recognized that such emissions can cause or contribute to exceedances of those air quality standards. Although EPA's SSM SIP Call is pending judicial review, the rule has not

ED_002374_00011557-00008

been stayed and remains effective. Consequently, Texas is legally required to conform its RACT regulations to that SSM SIP Call. And EPA's proposal to approve the Texas RACT SIP despite the state's continued allowance for SSM affirmative defenses is unlawful.

Moreover, the Texas affirmative defense renders the state's control requirements less protective than RACT by effectively allowing sources to emit above RACT levels without sanction. As documented in a recent report by the Environmental Integrity Project, emissions during SSM events often reach dangerous levels, far in excess of legal limits.[15]

VI. TEXAS UNLAWFULLY AND ARBITRARILY FAILED TO REVISIT WHETHER ADDITIONAL CONTROLS ARE AVAILABLE TO ACHIEVE ATTAINMENT.

Texas arbitrarily and unlawfully failed to revisit and reevaluate RACT for source categories for which the state previously found (in its SIPs for the 1997 and/or 1-hour standard) that no additional controls were available. In its final rule implementing the 2008 ozone NAAQS, EPA explained how states should evaluate RACT for the 2008 standard where, as here, the state imposed existing RACT controls to meet the 1997 standard. EPA explained, "[t]here are cases where the initial RACT analysis under the 1-hour standard or the 1997 standard for a specific source or source category concluded that no additional controls were necessary. In such cases, *a new RACT determination is needed* to consider whether more cost effective control measures have become available for sources that were not previously regulated. A re-analysis may determine that controls are now economically and technically feasible and are necessary to meet the RACT requirements." 80 Fed. Reg. at 12,280 (emphasis added).

Here, the state's RACT submission does not even attempt to identify, revisit, or re-evaluate RACT for all source categories where the state found, under the 1-hour or 1997 standards, that no additional controls were necessary. See https://www.regulations.gov/document?D=EPA-R06-OAR-2017-0055-0005. This is directly contrary to EPA's 2008 ozone NAAQS implementation rule. Accordingly, EPA approval of the RACT SIP would be unlawful and arbitrary.

VII. THE THRESHOLD FOR THE APPLICATION OF RACT IN THE HGB AREA IS 25 TONS PER YEAR, NOT 100.

Finally, Texas's threshold for the application of RACT should be 25 tons per year ("tpy"), not 100 tpy, because, under anti-backsliding regulations, the HGB area's governing classification should be "severe," per both the 1979 and 1997 NAAQS, rather than "moderate." Under the Clean Air Act, in "severe" nonattainment areas, RACT applies to a broader range of existing sources. In particular, for severe areas, a major source is defined as any source with the potential to emit at least 25 tons per year of ozone-forming pollution. 42 U.S.C. § 7511a(d), (f)(1). For moderate areas, by contrast, the major source threshold is 100 tons per year. *Id.* § 7602(j). Although the Houston area should be designated a as a severe area under both the 1979

[15] Environmental Integrity Project, Breakdowns in Air Quality Air Pollution from Industrial Malfunctions and Maintenance in Texas, *at* https://environmentalintegrity.org/wp-content/uploads/Breakdowns-in-Air-Quality.pdf.

ED_002374_00011557-00009

and 1997 ozone NAAQS because Texas failed to meet the standards before their revocation, EPA effectively stripped the HGB area of those more protective RACT requirements via unlawful "substitute redesignations."

As explained in an Opposition filed by several of the Commenters to an EPA Motion to Dismiss their petition for review (currently pending in the Fifth Circuit), ozone pollution in the HGB area has been at unhealthy levels for so long that EPA was forced to classify the area as being in "severe" nonattainment under both the 1979 and 1997 NAAQS. Because the HGB area had not complied with either standard by the time EPA revoked them, and in fact the Houston area also failed to comply with the 2007 attainment deadline under the 1979 NAAQS, the HGB area was subject to all the protections required under the Clean Air Act's severe classification.

However, after EPA promulgated the 2008 ozone NAAQS and subsequently revoked the 1979 and 1997 standards, the agency purported to redesignate the Houston nonattainment area into attainment for the revoked ozone NAAQS. 80 Fed. Reg. 49,970, 49,973/1(Aug. 8, 2015) (proposing substitute redesignation for Houston area under 1979 NAAQS); 80 Fed Reg. 63,429/3-30/1(finalizing same); 81 Fed. Reg. 33,166, 33,168/1-2 (May 25, 2016) (proposing substitute redesignation for Houston area); 81 Fed. Reg. 78,691, 78,693/1 (Nov. 8, 2016) (finalizing same). Although the Houston area should have been subject to all of the Clean Air Act's protections for "severe" nonattainment areas under the anti-backsliding provisions of the Act, EPA's "redesignation substitute" effectively stripped the Houston area of those more stringent protections.

For all of the reasons explained in the Commenters' attached briefing, EPA's redesignation substitute is unlawful. Relevant here, this means that Texas's threshold for the application of RACT is also illegal.[16] The threshold application should be 25 tpy, not 100 tpy, because the HGB area is properly classified as severe under both the 1-hour and 1997 standards. Accordingly, Texas's failure to make RACT determinations for all sources with the potential to emit at least the 25 tpy threshold of ozone precursors was unlawful.

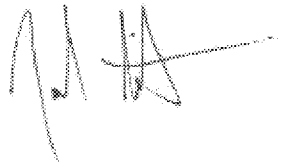
VIII. CONCLUSION

For all the foregoing reasons, EPA must disapprove Texas's RACT SIP for the HGB area.

Sincerely,

[16] We recognize that EPA is taking the position that the 25 tpy threshold continues to apply to sources already subject to that threshold prior to the substitute redesignation. While we agree that such "grandfathered" sources must remain subject to RACT, that does not excuse EPA's exemption of non-grandfathered sources from the 25 tpy threshold.

ED_002374_00011557-00010



Joshua Smith
Senior Attorney
Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612
joshua.smith@sierraclub.org
415-977-5560

Bakeyah Nelson, PhD
Executive Director, Air Alliance Houston
3914 Leeland,
Houston, TX 77003
bnelson@airalliancehouston.org
713-528-3779

David Baron
Attorney
Earthjustice Washington, D.C. Office
1625 Massachusetts Avenue, NW, Suite 702
Washington, DC 20036
dbaron@earthjustice.org
202-667-4500 Ext. 5203

Juan Parras, Executive Director
Texas Environmental Justice Advocacy Services
6733 Harrisburg Boulevard
Houston, TX 77011
parras.juan@gmail.com

Adrian Shelly
Director, Public Citizen—Texas Office
309 E 11th St., Suite 2
Austin, TX 78701
ashelly@citizen.org
512-477-1155

ED_002374_00011557-00011